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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 234

PAUL GINSBURG, Petitioner,

v.

HORACE STERN and PATRICK N. BOLSINGER,
Respondents.

MOTION TO REMAND
And, In The Alternative,
PETITION FOR REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court to vacate its Order entered on October 14, 1963, denying his petition for writ of certiorari (*United States of America, Petitioner, v. The Ohio Power Company*, 353 U.S. 98, 1957); then to grant the petition for writ of certiorari and vacate the Judgment of the Court of Appeals sought to be reviewed (App. 1); and thereupon to reverse the said Judgment sought to be reviewed, and remand (28 U. S. C., section 2106) the

above entitled cause to the Court of Appeals for further proceedings (*United States of America, Petitioner, v. Shotwell Manufacturing Company, et al.*, 355 U. S. 233, 1957; citing and relying upon *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh v. United States*, 352 U.S. 1); requiring the said Court to enter an adjudication on the merits as required (*United States v. International Building Co.*, 345 U.S. 502, 506, and see also 354 U.S. 393); and, in the alternative,

PETITION FOR REHEARING

The Petition for Rehearing of Paul Ginsburg, petitioner, respectfully prays that this Honorable Court will grant a rehearing of his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and

In support of his Motion to Remand and, in the alternative, Petition for Rehearing, it is averred:

1. The above captioned proceeding came before this Honorable Court on the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, the respondents' Brief in Opposition and Petitioner's Reply Brief.

2. In the petitioner's said Petition, the Questions Presented were as follows:

> **(1) Is not a litigant entitled to notice and the right to be heard in advance of judgment, pursuant to the Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States?**

(2) When it is a matter of record that judgments have been entered against a litigant without notice and the right to be heard thereon, and when attachment execution proceedings likewise without notice have been had thereon, has not the victimized litigant been dprived of property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States?

(3) When unallowable costs for printing are taxed against the unsuccessful appellant in the Court of Appeals by the Clerk instead of by the Court, pursuant to appellees' unserved Bills of Costs, and the amounts thereof are inserted in the Mandate by the Clerk of the Court without notice to or knowledge of the appellant and thus in violation of that Court's Rules providing for proof of service before filing and the right to be heard by the Court on allowability of costs in advance of the taxing and insertion in the Mandate; following which the Clerk of the District Court entered Judgments based thereon still without notice, pursuant to which the defendants then proceeded with attachment of plaintiff's bank accounts, with the result that plaintiff was taken by surprise, without knowledge of any of said proceedings until after the attachment of his bank accounts; have not such Judgments been entered through fraud and misconduct of adversaries and have not the refusals of the District Court and the Court of Appeals to consider and adjudicate motions to vacate those Judgments pursuant to F.R.C.P.

Rule 60 (b) resulted in deprivations of property without due process of law (1) conflicting with decisions of the instant and other Courts of Appeals on the same matter, (2) conflicting with applicable decisions of this Court on a federal question and (3) so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(4) Should not this Honorable Court reverse the Judgment sought to be reviewed, or at least remand the cause with directions that the issues involved be adjudicated on the merits, when it is patent as a matter of record that the issues involved have never been adjudicated in the lower Courts and that the decisions of the lower Courts are clearly erroneous?

3. *It was plainly evident from the said Petition, that all of the Questions Presented should have been answered in the affirmative.*

4. In the supposed Brief in Opposition of the respondents, they failed to comply with the provisions of paragraph 1 of Rule 24 for their failure to disclose "any matter or ground why the cause should not be reviewed by this Court". As a matter of fact, instead of presenting a brief in opposition pursuant to the Rules of this Honorable Court, the respondents actually have attempted to misrepresent the cause through re-presenting it in a self-serving way, in violation of the record facts and the applicable law and Rules of Court.

5. Petitioner's Reply Brief showed that contrary to the usual and accepted practice relating to briefs in opposition permitted to be filed in this Honorable Court.

the respondents offered a Question Presented, a Statement of the Case and an Argument, obviously intended to confuse the true Questions Presented in the Petition, distort the real Statement of the Case, and then disconcert the Reasons Relied on for the Allowance of the Writ,—which contention was entirely established therein by your petitioner. Furthermore, it was established in the Reply Brief how obviously untenable and insupportable were the respondents' unsound arguments, and then how little your petitioner actually was seeking from the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States,—*merely the right to be heard in advance of judgment.*

6. It is respectfully submitted that upon the record herein, this Honorable Court should review and reverse or review and remand; and that the only legal justification for the refusal to review and reverse, could be the fact that the Judgment sought to be reviewed was not adjudicated on the merits and, as a matter of practice, this Honorable Court declines to review unadjudicated issues. *United States of America, Petitioner, v. Shotwell Manufacturing Company, et al., Communist Party v. Subversive Activities Control Board, Mesarosh v. United States, supra.*

7. In view of the averments of the immediately preceding paragraph, and particularly because your petitioner has been seeking without any consideration or success whatever the protection and enforcement of his rights under the Due Process Clause which the jurists have sworn to uphold, this Honorable Court's attention is drawn to its pronouncements in the case of (p. 506) *United States v. International Building Co., supra*, as follows: "But unless we can say that they were an adjudication on the merits, the doctrine of estoppel by judgment would serve an unjust cause; it would become a

device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See *Commissioner v. Sunnen, supra*, at 598"; as well as its decision reported in 354 U. S. 393, whereby it remanded a cause to the lower Court to pass upon the issues of protection under the Due Process Clause.

8. A remand of the instant cause as sought herein is also required pursuant to this Honorable Court's power of supervision, *because it is so obvious that the Court of Appeals failed to accompany the Judgment sought to be reviewed (App. 1) with an opinion or even assign any reasons therefor.* Thus the Court of Appeals did not comply with the usual and accepted practice relating to opinions of Court or with the provisions of the applicable Canons 19, 20 and 22 of the Canons of Judicial Ethics. In this respect too, your petitioner has been deprived of his guaranteed right to due process of law. The said right to an opinion is also required by the Right to Know, and at this point it is submitted that the Judgment sought to be reviewed could not have been accompanied by a *supporting opinion*

9. Under the Constitution and laws of the United States, everybody is entitled to due process of law, as sought herein. Both prior to and since the entry of this Court's Order denying the instant petition for writ of certiorari, this Honorable Court has granted writs of certiorari or remanded causes on innumerable less cogent applications than the instant one.

10. *Prior to this cause* advocated on behalf of petitioner, whose petition should and could be granted

at no cost to the government, this Honorable Court sanctioned proceedings whereby nine Negro children were assisted in attending a public school in Little Rock, Arkansas, at an estimated cost to our government of $5,000,000.00. The Court, furthermore, granted petitions on behalf of persons charged with activities subversive to our government, meticulously guaranteeing even their rights to due process of law. It is also common knowledge that innumerable applications of admitted criminals who have confessed the commission of serious crimes have been granted in the interest of due process of law.

11. *Since the denial of the instant petition* (one week later), this Honorable Court continued its policy of such protection and enforcement of rights to due process of law. On October 21, 1963, it was reported in the *Pittsburgh Press* that this Honorable Court on that day (a) granted the petition of Mr. Vito Genovese, "recently identified as 'boss of all bosses' of the Cosa Nostra crime cartel", whereby this Court "In a brief order vacating the 1959 convictions of Genovese and nine co-defendants, the high court directed the Second U. S. Circuit Court of Appeals to take another look at the case in light of a Supreme Court decision last term"; (b) this Court "Reversed the convictions of 373 Negro students found guilty of breach of the peace for demonstrating against segregation policies at Orangeburg, S. C., in 1960. The court had sent the case back to South Carolina last term for rehearing and the State Supreme Court had upheld the convictions. Today's brief order was a summary reversal of the state action"; (c) this Court "Agreed to hear arguments on a challenge to Delaware's recent legislature reapportionment. Four cases from other states also will be heard this year";

and (d) this Court "Granted a hearing to Jesse James Arnold and George Dixon, two Negroes sentenced to death for a 1961 robbery-murder in North Carolina. Their appeal said systematic exclusion of Negroes from the grand jury invalidated the indictment".

12. In view of the averments of paragraphs 9, 10 and 11, your *petitioner repeats that he has asked very little of this Honorable Court in petitioning for the right to be heard in advance of judgment.* It is well known that your petitioner, a member in good standing of the Bar of this Honorable Court, has for many years been advocating the protection and enforcement of his clients' rights to due process of law. Under such circumstances and in view of the foregoing, it is respectfully submitted that he, himself, is indeed entitled thereto.

13. Thus it is respectfully submitted that upon reconsideration of his cause, the Court should remand the cause for further proceedings, or grant a rehearing of the Petition for Writ of Certiorari.

WHEREFORE, petitioner respectfully prays that this Honorable Court will enter an Order granting his Motion to Remand or allowing his Petition for Rehearing.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

Dated: 4 November 1963.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.